

ITAT remanded matter as TPO adopted TNMM method without identifying relevant comparables

Summary – The Mumbai ITAT in a recent case of Lehman Brothers Securities (P.) Ltd., (the Assessee) held that where assessee rendering investment advisory services to its AE to determine ALP of international transactions, adopted profit/revenue split method as most appropriate method while TPO adopted TNMM and while identifying comparables, he selected ITES/BPO sector in absence of comparables in field of investment banking, matter was to be readjudicated afresh

Facts

- The assessee-company was part of Lehman Brothers group and had offered financing and advisory salutations to its clients in India in the field of Investment Banking Division.
- With respect to its investment banking Division transaction with its AE, the assessee submitted its transfer pricing study wherein arm length price (ALP) of revenues from IBD was computed by applying revenue profit split method which was claimed to be based on Global Policy of Lehman Brothers Group.
- The assessee contended before lower authorities during the course of assessment/first appellate proceedings that the assessee could not make proper representations before the authorities below owing to collapse of Lehman Brother which led to its liquidation in 2009 and the employees of the group left the organisation, which made it difficult to collate information as desired by the authorities below during assessment/first appellate stage and the Profit/revenue split method was the most appropriate method to benchmark international transactions with its AE as the transactions were integrated, inter-connected and seamless wherein various Lehman Brother entities across globe participate along with bankers and client to successfully conclude the transactions.
- However, the TPO rejected this method as the assessee could not explain the basis of the same properly and applied TNMM at entity level and comparables were drawn by TPO accordingly which led to net transfer pricing additions proposed by the TPO.
- On appeal:

Held

- The assessee could not make effective representations before the authorities below due to extraordinary situation faced by the assessee owing to collapse of Lehman Brothers group worldwide leading to liquidation in 2009 and this year was also the first year of operation and it is claimed that there certain extraordinary expenses such as fees paid for increase in share capital, rental paid for premises lying vacant due to non-appointment of employees being first year of operation, signup bonuses being given to employees on joining the assessee and recruitment cost incurred in the initial phase of appointment of the new employees as assessee's base being setup in India which deserves to be seen by the authorities below on merits in accordance with law before

arriving ALP of its international transactions with AE. The assessee has prayed and agreed for open set-aside to enable it to make effective representation before the authorities below in *de novo* proceedings wherein necessary evidences and explanations could be furnished and authorities below can take view on issues which arises or may arise during *de novo* assessment proceedings on merits in accordance with law after hearing the assessee. Revenue has also after considering the factual matrix of the case and concession granted by the assessee fairly agreed for an open set aside wherein all the issues which arises or may arise in assessment are kept open and TPO/Assessing Officer will be free to adjudicate all such issue's afresh on merits in accordance with law after hearing the assessee and considering the material placed on record. Duly considering the factual matrix of the case and the view that keeping in view exceptional circumstances faced by the assessee during the period when the proceedings were underway with the revenue for framing assessments as well during first appellate proceedings, due to collapse of Lehman Brother group worldwide, the assessee could not make effective representations before the authorities below and interest of justice demand that the assessee be given one more opportunity to present all evidences and explanations in its support before the authorities below in *de novo* assessment proceedings. The onus shall be on the assessee to bring on record necessary evidences and explanation in support of its contentions with respect to issues that arises or may arise during *de novo* proceedings. Hence, keeping in view factual matrix of the case, the tribunal inclined to set aside and restore the matter back to the file of the Assessing Officer/TPO for afresh determination of all issues which had arisen or may arise during assessment on merits in accordance with law including the methodology adopted by the assessee for benchmarking its international transactions with AE.